United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

No. 76-4044

United States Court of Appeals

FOR THE SECOND CIRCUIT

BOC INTERNATIONAL LIMITED, f/k/a THE BRITISH OXYGEN COMPANY, LIMITED, BOC FINANCIAL CORPORATION, BOC HOLDINGS, LIMITED, AND BRITISH OXYGEN INVESTMENTS, LIMITED, *Petitioners,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

On Petition for Review of and to Set Aside an Order of the Federal Trade Commission

B

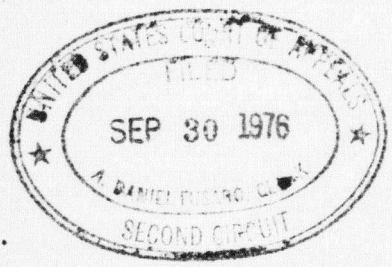
P/S

AMICUS CURIAE BRIEF OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

EARL W. KINTNER
MARK R. JOELSON
JOSEPH P. GRIFFIN

ARENT, FOX, KINTNER, PLOTKIN & KAHN
1815 H Street, N.W.
Washington, D.C. 20006
202/857-6040

Attorneys for the Government of the United Kingdom of Great Britain and Northern Ireland



PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

Page

INTRODUCTION 1

INTEREST OF THE BRITISH GOVERNMENT 2

STATEMENT OF THE ISSUE 3

STATEMENT OF THE CASE 4

STATEMENT OF THE FACTS 4

I. BOC's History with Regard to Expansion .. 4

II. BOC's Entry Into Canada 5

III. BOC's Interest in Entering the American Market 6

SUMMARY OF ARGUMENT 7

ARGUMENT 10

I. THE COMMISSION DREW UNJUSTIFIED CONCLUSIONS FROM THE RECORD 10

A. An Erroneous Analogy to Past Market Entries was Drawn 10

B. BOC's Evidence was Improperly Disregarded 12

C. The Commission Placed Undue Reliance Upon Testimony of Industry Members as to the Likelihood of BOC's Entry 14

II. THE COMMISSION APPLIED AN ERRONEOUS LEGAL ANALYSIS 15

A. The Commission Erred In Finding That There Were Feasible Alternative Means of Entry 16

1. An Analysis of All Relevant Factors is Required 16

2. Barriers to Acquisitions by Foreign Firms Are Relevant 18

Page

3. All Relevant Factors Were Not Analyzed 21

B. The Acquisition Was a Permissible Toehold in the Context Presented 22

1. The Commission Made No Toehold Analysis 23

(a). *Phillips* is Easily Distinguishable 25

(b). There is No Presumption Concerning the Acquisition of a Firm Whose Market Share is More Than 10% 26

2. The Acquisition was Pro-Competitive . 28

III. The Effect of the Commission's Decision on International Investment 30

Conclusion 33

Annex A Selected List of Commercial, Cultural, and Statutory Barriers to Entry by Foreign Firms into the United States A-1

TABLE OF AUTHORITIES

Cases:

Beatrice Foods Co., 81 F.T.C. 481 (1972) 19
Bendix Corp., 77 F.T.C. 731 (1970), *vacated on other grounds*, 450 F.2d 534 (6th Cir. 1971) 23
Brown Shoe Co. v. United States, 370 U.S. 294 (1962) 16-17
Budd Co., 3 CCH Trade Reg. Rep. ¶ 20,998 (FTC 1975) 23, 26-27
Coclin Tobacco Co. v. British American Tobacco Co., 210 F. Supp. 779 (S.D.N.Y. 1962) 2
Holophane Co. v. United States, 352 U.S. 903 (1956) .. 2
Missouri Portland Cement Co. v. Cargill, Inc., 498 F.2d 851 (2d Cir.), *cert. denied,* 419 U.S. 883 (1974) .. 22

Page

Stanley Works v. FTC, 469 F.2d 498 (2d Cir. 1972), *cert. denied*, 412 U.S. 928 (1973) 27
Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951) 2
United States v. The Black & Decker Mfg. Co., —— F. Supp. —— (D.Md. Aug. 20, 1976) (Civil No. 73-964-B) 18, 27
United States v. Continental Can Co., 378 U.S. 441 (1964) 17
United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964) 17
United States v. Falstaff Brewing Corp., 410 U.S. 526 (1973) 13
United States v. General Dynamics Corp., 415 U.S. 486 (1974) 21
United States v. Glaxo Group Ltd., 410 U.S. 52 (1973) 2
United States v. Imperial Chemical Indus., Ltd., 100 F. Supp. 504 (S.D.N.Y. 1951) 2
United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974) 8, 17-19, 21, 27
United States v. Phillips Petroleum Co., 367 F.Supp. 1226 (C.D. Cal. 1973), *aff'd without opinion*, 418 U.S. 906 (1974), *reh. denied*, 419 U.S. 886 (1974) .24-25
United States v. Scophony Corp. of America, 333 U.S. 795 (1948) 2
Varney v. Coleman Co., 385 F. Supp. 1337 (D.N.H. 1974) 27

STATUTES:

CLAYTON ACT, Section 7, 15 U.S.C. § 18 ..... 3, *passim*

OTHERS:

Bureau of Econ. Analysis, Dept. of Commerce, 56 SURVEY OF CURRENT BUS., No. 8 (Aug. 1976) 30

Page

The Cohesion of the Industrial Democracies: The Precondition of Global Progress (Statement by Secretary Kissinger before the Council of the OECD) 75 STATE DEPT. BULL. 73 (July 19, 1976) 33

INTERNATIONAL ECONOMIC REPORT OF THE PRESIDENT (U.S. Government Printing Office, March 1976) .. 31

INTERNATIONAL INVESTMENT, GUIDELINES FOR MULTINATIONAL ENTERPRISES (Foreword by Secretary of State for Industry), Cmnd. 5625 (June 1976) ... 31

Organization for Economic Co-operation and Development Council Meeting at Ministerial Level: Declaration on International Investment and Multinational Enterprises, 15 INT'L L. MATS. 967 (1976) ..32-33

W. PROSSER, THE LAW OF TORTS (St. Paul: West Publishing Co., 1971) 21

U.S. DEPARTMENT OF COMMERCE, REPORT TO THE CONGRESS: FOREIGN DIRECT INVESTMENT IN THE UNITED STATES (U.S. Department of Commerce, 1976) .. 19

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 76-4044

BOC INTERNATIONAL LIMITED, f/k/a THE BRITISH OXYGEN COMPANY, LIMITED, BOC FINANCIAL CORPORATION, BOC HOLDINGS, LIMITED, AND BRITISH OXYGEN INVESTMENTS, LIMITED, *Petitioners,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

On Petition for Review of and to Set Aside an Order of the Federal Trade Commission

BRIEF FOR AMICUS CURIAE

INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 29, the Government of the United Kingdom of Great Britain and Northern Ireland (hereinafter referred to as "the British Government"), having obtained the written consent of all parties, submits this Brief as *amicus curiae,* in support of BOC's [1] request that the order of the Federal Trade Commission (hereinafter referred to as "the Commission") under review in this case be set aside.

[1] As used in this Brief, "BOC" refers to the four Petitioners in case number 76-4044, unless the context indicates otherwise.

The British Government normally refrains from expressing its views to the courts of other nations and does so only in cases of considerable governmental interest and concern. Thus, although there have been many United States antitrust cases involving British companies,[2] this is the first instance in recent years in which the British Government has sought to offer its views to a court vested with jurisdiction over such litigation. This fact is a measure of how much importance, as a matter of principle, the British Government ascribes to this case.

INTEREST OF THE BRITISH GOVERNMENT

The British Government is concerned that the decision of the Commission under review in this proceeding will, if not set aside, adversely affect important policies which have long been promoted by the Governments of the United States and Great Britain. The United States Government has frequently declared an "open door" policy for foreign investment and has noted the many advantages accruing from the reciprocal flow of investment and technology between friendly countries. Successive British Governments have welcomed foreign investment, which has made and continues to make a substantial contribution to the United Kingdom economy, and this is still British Government policy. It is the opinion of the British Government that, if the decision of the Commission at issue in this case is allowed to stand, a significant new barrier to the flow of foreign investment between the United Kingdom and the United States will be erected. Such a barrier will result if the Commission's approach to the "actual potential en-

---

[2] *See, e.g., United States* v. *Glaxo Group Ltd.*, 410 U.S. 52 (1973); *Holophane Co.* v. *United States*, 352 U.S. 903 (1956); *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951); *United States* v. *Scophony Corp. of America*, 333 U.S. 795 (1948); *Coclin Tobacco Co.* v. *British American Tobacco Co.*, 210 F. Supp. 779 (S.D.N.Y. 1962); *United States* v. *Imperial Chemical Indus., Ltd.*, 100 F. Supp. 504 (S.D.N.Y. 1951).

trant" and "toehold" theories, in the context of entry by foreign firms into the United States, is adopted by this Court.

At the outset it should be emphasized that the British Government does not challenge the jurisdiction of the Commission to apply the U.S. antitrust laws to acquisitions such as the BOC-Airco transaction. Nor does it contend that the basic standards of legality under the U.S. antitrust laws should be different for foreign, as opposed to domestic, firms. Rather, the British Government contends that, in a case such as this, those basic standards of legality require that account be taken of the special circumstances which are inherent in the entry of a foreign firm into the United States.

In other words, it is submitted that the Commission erred in its application of Section 7 of the Clayton Act in the factual context presented in this case. The underlying failure to recognize and to evaluate properly the factors peculiar to this case and to the acquisition of an American company by a foreign company carries implications transcending the question of the BOC-Airco acquisition and threatens detrimental consequences far beyond the interests of the private parties to this litigation. For this reason, the British Government feels compelled to present its view in support of the petition to set aside the decision of the Commission.

STATEMENT OF THE ISSUE

The only issue that will be addressed by the British Government is whether the Commission failed to adjudicate properly the industrial gases portion of this case in the meaningful economic perspective required by Section 7 of the Clayton Act.

STATEMENT OF THE CASE

The British Government adopts by reference the Statement of the Case presented by BOC at pages 3-10 of its Brief.

STATEMENT OF THE FACTS

Only those facts in the record which are relevant to the issue addressed by the British Government will be discussed in this Brief. The arguments set forth by the British Government are, of course, based upon the evidence adduced before the Commission and contained in the record.

In reviewing the record it is important to keep in mind that the vast majority of the evidence is undisputed and that the controversy turns on the proper interpretation of, and legal conclusions to be drawn from, this largely undisputed evidence.

I. BOC's History With Regard to Expansion

BOC originated with a small Scottish company which produced oxygen for theatrical lighting at the end of the nineteenth century. (A2559) Until the late 1950's, BOC's international expansion was exclusively in countries of the old British Commonwealth where there was obvious common ground in terms of familiar legal and commercial practices, and sentiment. (A6000) This initial phase of expansion included Australia (1912), India (early 1900's) (which at that time included Pakistan and Bangladesh), South Africa (1927), Singapore, Malaysia, Hong Kong (1948-50), and Canada (1949). (A2562, A2630-32, A4264-70) After 1956, BOC began to expand into non-Commonwealth countries, *e.g.*, Brazil, Indonesia, Italy, and Thailand. (A766-67, A856, A2565)

This expansion covering the first two-thirds of the twentieth century followed a general pattern: (1) the industrial gases industries and markets in these countries

were either nonexistent or small and comparatively unsophisticated; (2) at the time of entry, tonnage production was not a significant factor in these countries; (3) either there was no competition in the industry because BOC's entry marked the birth of the industry, or the existing firms were small and not entrenched; and (4) regardless of whether entry was *de novo* or by acquisition, the product markets or plants involved were small by the standards of the American market. (A2559-66, A2625, A2629-32, A4264-70, A5109-11, A6000)

II. BOC's Entry Into Canada

It seems to be implicit in the Commission's Opinion that BOC's entry into Canada was analogous to entry into the United States. The British Government submits that this suggestion is not consistent with the uncontradicted evidence in the record.

In 1949, BOC incorporated a subsidiary (Canox) in Canada and attempted a *de novo* entry into the Canadian industrial gases industry. The subsidiary lost money for 10 to 12 years. Subsequently, over a period of years, the subsidiary acquired approximately 20 distributors and small producers. By 1973 the subsidiary had obtained 8 to 9% of the gases sales in the Canadian market. This experience was summed up by a senior BOC official as follows: "it took about 15 years to reach what we would call a viable position in a market which really wasn't very well developed at the time...." (A3332) (A2798-2803, A3330-32, A4265)

In the late 1960's when BOC began to explore the possibilities of entering the American industrial gases market, it considered whether its Canadian operation could serve as a launching pad for entry into the United States. It concluded that such an idea was not practical because: (1) the cost of the Canadian product was "hopelessly uncompetitive" with large-scale American tonnage plants; (2) the Canadian subsidiary was primarily a distribution company

and lacked the necessary experience in large-scale production of industrial gases; (3) the management of the subsidiary was not deemed to have the depth or expertise needed to deal with the problems of entry into the United States; and (4) the top management of BOC "would not, as a policy, have entered such an important market as [America], such a well-developed marked [*sic*] as America from a market such as Canada which is really relatively less well developed." (A3331) (A2516-17, A5120)

A discussion paper entitled "BOC and the USA" prepared in August 1969 by BOC's planning group concluded a section of the paper entitled "Canada as a Base?" by stating that "while Canox has an important and valuable place as base for the BOC Group in North America, its existence and its further development cannot be seen as substitute for Group business development policies for the USA." (A3976) Mr. Perham, chairman of the Canox board, commented in a letter to the author of this discussion paper:

> I certainly agree with you that Canada is not a base for penetration of the USA market. The best it can do is provide a home for the period in which we are conducting our search. (A3967)

III. BOC's Interest In Entering The American Market

It appears from the evidence that BOC since the mid-1960's had been interested in entering the American industrial gases market. BOC initiated ventures and studies which it hoped would result in the discovery of a practical and successful method of entering the American market. However, the results of these ventures and studies uniformly discouraged BOC's management. Consequently, BOC's leaders had abandoned the idea of entering the American market in the foreseeable future and had turned their attention elsewhere before the unexpected opportunity presented by Airco arose in 1973. (A2469-70, A2501-03)

The details of these ventures and studies are set forth in considerable detail at pages 32-41 of BOC's Brief. For the British Government's purposes it suffices to note that: (1) BOC abandoned its joint venture in the United States with Airco because it believed that the venture was not commercially successful; (2) the contacts involving Burdett of Cleveland, Burdett of Norristown, and Chemetron concerning BOC's possible acquisition of those companies proved not to be worthy of serious pursuit; and (3) BOC's studies of possible methods of entry all concluded, and management agreed, that "BOC has no superior skills unknown or unexploited in the USA." (A5990) Thus, in 1970 the Perham-Greenfield Report concluded that there was:

> no case for entering the USA industrial gas market as a producer for either on-site supply or merchant requirements.
>
> * * * *
>
> This generally negative conclusion is in relation to the foreseeable future and should not be considered final. Opportunities could arise in the future and a periodic review of the situation is recommended. [A5974]

There is no evidence in the record that these conclusions were unreasonable or that the various documents supporting these conclusions were prepared for use as "self-serving" evidence in anticipation of litigation. In fact there is considerable testimony in the record by outside experts which supports the conclusions reached by BOC's management. (*See, e.g.,* A1631, A1861-62, A2965-70)

SUMMARY OF ARGUMENT

The Commission drew unjustified conclusions from the record and applied an unsound legal analysis in terms of the "actual potential entrant" and "toehold" theories. In particular, it did not consider and evaluate properly the barriers which make *de novo* or toehold entry into a United

States industry by a foreign firm inherently more difficult than such *de novo* or toehold entry by an American firm.

The Commission's effort to analogize entry into the United States with BOC's entries into Canada, Brazil, and other nations is not supportable. The record establishes that the controlling factor in BOC's decision whether to enter any country, industrialized or not, was the level of development of that country's industrial gases industry. The countries which BOC did enter had undeveloped industrial gases industries as compared to the American industry in 1973.

The evidence clearly established that BOC did not plan to enter the U.S. industrial gases market in the foreseeable future. The Commission's disregard of this testimonial and documentary evidence was unjustified because there was no significant evidence that contradicted the testimony of BOC's officials.

The Commission did not take into account the factors peculiar to the acquisition of an American firm by a foreign firm. Its decision therefore did not evaluate the merger in its proper economic perspective, as is required by Section 7 of the Clayton Act and relevant cases, particularly, *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602 (1974). There was no analysis of the obstacles to entry by foreign firms or of the probably pro-competitive effects of the Airco acquisition.

All firms, whether domestic or foreign, face a series of obstacles to entering a new market. However, a foreign firm seeking to enter a market in another country faces numerous additional commercial, cultural, and other barriers which do not confront firms expanding inside a single nation. At first glance, because of common language, the United States might appear to be a market posing few problems for a British company seeking entry, but closer examination shows that there are a number of important

obstacles for British, as well as other foreign firms, to overcome. Differences in the size of the market, in commercial practices, and in the legal framework alone are significant.

Although, generally, such barriers are not individually insurmountable, their cumulative effect is to increase the difficulty of entry by a foreign firm. In some situations these barriers may make *de novo* entry or small toehold acquisitions impossible or impractical. Therefore, the Commission should consider the effect of the barriers to foreign entry in particular cases. This was not done in this case.

Moreover, even if it were assumed that BOC was an actual potential entrant into the American industrial gases market, the Commission's Opinion did not analyze whether the acquisition of Airco was a permissible toehold acquisition.

Although the Commission's Opinion suggests that the Commission has adopted *sub silentio* a presumption that the acquisition of a firm with more than 10% of the market cannot be a permissible toehold, such a presumption is neither mandated nor contemplated by the relevant precedents. Flexibility and detailed analysis on the question of toehold entry are especially important in a case involving the acquisition of an American firm by a foreign firm, because foreign firms wishing to enter an American market face much higher barriers to their entry than do American firms. It is submitted that the acquisition was a permissible toehold in the context presented.

The decision of the Commission at issue in this case may well erect a new barrier to foreign investment in the United States. The Commission's treatment of the "actual potential entrant" and "toehold" theories places primary reliance on what is essentially a subjective approach to whether and how a foreign firm may enter the United States. Years of careful analysis and experience by the for-

eign firm are ignored. Moreover, a critical dimension of this acquisition, *i.e.,* that it was a market entry by a foreign firm, is not sufficiently considered.

It is important for the continuation of policies encouraging foreign investment that host governments recognize that entries by foreign firms are more difficult than are domestic entries and that antitrust adjudication take this factor into account.

ARGUMENT

I. THE COMMISSION DREW UNJUSTIFIED CONCLUSIONS FROM THE RECORD

Although most of the evidence in the record is, as noted, uncontradicted, the inferences drawn from that evidence by the Commission are the subject of controversy.

A. An Erroneous Analogy to Past Market Entries was Drawn

The Commission found that, but for the acquisition of Airco, BOC would probably have eventually entered the U.S. industrial gases market through internal expansion, or its equivalent. It supported this contention by stating that BOC "has expanded into some 17 countries, including such industrialized nations as Australia, South Africa, Canada, India, Pakistan, Italy, and Brazil." (A882) The clear implication of this passage in the Commission's Opinion is that these *de novo* or toehold entries are analogous to entry into the American market and, therefore, prove that BOC could and would have employed the same tactics to enter the United States if it had not acquired an interest in Airco.

In the submission of the British Government, the comparison between *de novo* and toehold entry into these other markets and potential entry into the United States market is unsound. The record reveals that BOC's entry into most of the countries cited by the Commission was made at a time when they were less developed, and certainly none of

them were at all comparable in industrial development with the United States. More importantly, the crucial factor in BOC's decision whether to enter any country, industrialized or not, was the level of development of that country's *industrial gases industry*. Thus, BOC did not enter countries such as Germany, Japan, or the United States which had well established industrial gases industries. Countries such as Canada and Italy were entered when their industrial gases industries did not have sophisticated production and marketing characteristics, in short, when their industries were undeveloped as compared to the American industry today. (A2566-67, A2625, A2629-32, A2713, A3330-32, A4265, A5109-11, A5120)

BOC's top management was keenly aware of the differences between BOC's previous entries into less developed industrial gases markets and entry into the United States industrial gases market. For example, a 1968 BOC management paper entitled "The Future Development of BOC as an International Concern" stated that:

> We are good at starting and building up to meet market demand at all levels of sophistication an industrial gas business. This is *at present* our main strength. It is one we can still exploit in any of the less developed parts of the world where we would not be too late on the ground, and even in parts at least of continental Europe. But we have not got much to exploit in North America, and Japan is doubtful.
>
> * * * *
>
> We have no major latent talents waiting unexploited to take us surging into Japan, Europe or USA. . . . [A5110-11 (emphasis in original)]

Similarly, in a letter to BOC shareholders concerning the acquisition of an interest in Airco, the Chairman of BOC noted that success in the industrial gases business:

> rests on an ability to identify an opportunity anywhere in the world and subsequently to exploit it locally by providing capital, technology and marketing experi-

> ence. In developing economies, the commitment is usually small and easily accommodated. In fully developed industrial economies, if there is no existing foothold, the commitment is very demanding of financial and managerial resources, and the progress towards a satisfactory return is difficult and slow. [A4848]

As was pointed out earlier in this Brief,[3] Canada was the most developed market BOC had entered and BOC had quite reasonably concluded that the Canadian market was very different from the American market. (A3331, A5120)

The validity of BOC's analysis and perception of the differences between entry into fully developed markets such as the United States and less developed markets was confirmed by the President and Chief Operating Officer of Airco in his testimony. He noted that the three characteristics of the American industrial gases industry are a low return on investment, very aggressive competition, and the need for scattered facilities because the products cannot be transported profitably from one region of the country to another. "This is really very different than most of the developing markets of the world, for example, where the growth rates are high and the competition is not as keen and the return may be higher initially." (A2713) Moreover, the Commission made no attempt to demonstrate that the markets mentioned were comparable to the American market.

On the basis of this record, it is submitted that the Commission's comparison between BOC's entry into other markets and potential entry into the U.S. market is unsound.

B. BOC's Evidence was Improperly Disregarded

BOC's testimonial and documentary evidence clearly established that it did not plan to enter the U.S. industrial gases market in the foreseeable future. The Commission

---

[3] *See* pages 5-6 *supra.*

disregarded this undisputed evidence concerning BOC's evaluation of its possible entry into the American market by holding that the testimony of BOC's officials was "self-serving." According to the Commission, such disregard for the evidence was proper because "[w]here objective considerations so clearly favor probable entry, contrary testimony by company officials as to future intent has little probative force." (A890) Although such a test was espoused by Mr. Justice Marshall in *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526 (1973),[4] the Commission erroneously invoked it in this case because there was insufficient contrary evidence in the record to justify disregard of the testimony of BOC's management.

The Commission cited no evidence concerning "objectively measurable market forces" or other objective evidence. It relied instead upon its own subjective prediction, the speculation of hostile industry witnesses, and unsubstantiated analyses of market trends. For example, the Commission stated that it had "difficulty in perceiving why" L'Air Liquide was able to enter on a small scale, "yet BOC could not."[5] (A887) Similarly, the Commission noted that "there is every reason to believe that [after certain future developments] BOC would be interested in

---

[4] I would hold that where, as here, *strong* objective evidence indicates that a firm is a potential entrant into a market, it is error for the trial judge to rely solely on the firm's subjective prediction of its own future conduct.

* * * *

[W]here objectively measurable market forces make clear that it is in a firm's economic self-interest to make a *de novo* entry and that the firm has the economic capability to do so, I would hold that it is error for the District Court to conclude that the firm is not an actual potential entrant on the basis of testimony by company officials as to the firm's future intent.

[*United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526, 548, 566 (1973) (concurring opinion) (footnote omitted) (emphasis added)]

[5] The circumstances that made L'Air Liquide's entry possible did not exist at the time of BOC's entry. Moreover, L'Air Liquide's entry deprived other possible entrants of the opportunity to acquire reasonable size toeholds other than Airco. *See* BOC's Brief at 59-60.

entry." (A891) Such speculation is not objective evidence. There is not sufficient objective evidence in this record that BOC was likely to enter the American industrial gases market *de novo* if it had not acquired its interest in Airco.

The Commission also erred in disregarding or ignoring documents that corroborate the testimony concerning BOC's plans for future expansion.[6] Many of these documents were prepared years before this litigation began and were uncontradicted by objective evidence.

If this Court were to affirm the Commission's disregard of the testimony offered by BOC's management and of the corroborative documentary evidence it would, in effect, be approving the substitution of the Commission's subjective prediction as to what is best for a company for the documented, reasonable opinion of that company's management. Such a substitution of "business judgment" was not warranted here. In the British Government's view, it is not reasonable for the Commission to ignore relevant evidence in the record concerning a firm's future plans unless there is significant contradictory objective evidence in the record. There was no such significant contradictory evidence in this record.

C. The Commission Placed Undue Reliance Upon Testimony of Industry Members as to the Likelihood of BOC's Entry

The Commission relied upon the testimony of members of the American industrial gases industry to support its conclusion that BOC had a "unique" status as the most likely entrant into the American market. (A883) The other three foreign industrial gases companies identified in the record as possible entrants (Linde A.G., Messer Griesheim and AGA) were held not to be actual potential entrants because they were not "considered by American firms to be very strong candidates for entry. . . ." (A883)

---

[6] *See* page 7 *supra.*

It is submitted that this heavy reliance upon the testimony of present members of the industry was improper. If this case had involved the "perceived potential entrant" theory, reliance on the perceptions of the present industry members might have been appropriate. However, the Commission held that this case was not one involving a perceived potential entrant. (A859) The question raised by the Commission was whether there was objective evidence that BOC would probably have entered the U.S. industrial gases market by internal expansion, or its equivalent, but for its acquisition of Airco. By relying on the testimony of present members of the industry the Commission relied upon the very people who had an interest in obtaining a decision by the Commission invalidating the challenged acquisition. The best way for the existing members of the industry to keep BOC out of the industry was for them to testify that they viewed BOC as being the most likely potential entrant. They faced immediate new competition from an Airco invigorated by BOC's management and resources unless they testified in such a way as to induce the Commission to invalidate the acquisition. Such testimony by members of the industrial gases industry is obviously self-serving and suspect.

It is submitted that existing members of an industry should not be permitted to bar a new competitor by offering speculative testimony, rather than factual evidence. Such testimony is inherently suspect. It is entitled to little weight unless corroborated by significant objective evidence. There was no such evidence in the record of this case. (See BOC's Brief at 115-17 for a discussion of "evidence" cited by the Commission.) Thus, the Commission erred by relying upon the self-serving testimony of present members of the American industrial gases industry.

II. THE COMMISSION APPLIED AN ERRONEOUS LEGAL ANALYSIS

The Commission's decision rests solely on the "actual potential entrant" theory. Counsel for BOC have argued in

their Brief why they consider that the "actual potential entrant" theory should not be adopted by this Court. The British Government does not wish to take a general position on this matter of U.S. domestic law. However, it does support BOC in contesting the application of this theory in the circumstances of this case.

A. The Commission Erred in Finding That There Were Feasible Alternative Means of Entry

Even if this Court were to accept the Commission's contention that the "actual potential entrant" theory states a cause of action under Section 7 of the Clayton Act in this case, the Commission's decision should be set aside because the Commission failed to analyze properly the factors necessary to prove a violation of Section 7 pursuant to the "actual potential entrant" theory. Specifically, the Commission wholly failed to take into account the factors peculiar to foreign investment.

1. An analysis of all relevant factors is required

Every acquisition or merger occurs in a unique set of circumstances. This is the teaching of *Brown Shoe* and its progeny.

> [W]hile providing no definite quantitative or qualitative tests by which enforcement agencies could gauge the effects of a given merger to determine whether it may "substantially" lessen competition or tend toward monopoly, Congress indicated plainly that a merger had to be functionally viewed, in the context of its particular industry.
>
> * * * *
>
> [footnote 38]
>
> Subsequent to the adoption of the 1950 amendments, both the Federal Trade Commission and the courts have, in the light of Congress' expressed intent, rec-

> ognized the relevance and importance of economic data that places any given merger under consideration within an industry framework almost inevitably unique in every case. Statistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market power; but only a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger.
>
> [*Brown Shoe Co.* v. *United States*, 370 U.S. 294, 321-22, 322n.38 (1962) (footnote omitted)]. *See United States* v. *Continental Can Co.*, 378 U.S. 441, 458 (1964); *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 660 (1964).

In its most recent decision involving the potential competition theory, *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602 (1974), the United States Supreme Court reaffirmed the need for a complete analysis of the relevant circumstances surrounding an acquisition. The Government had contended that the acquiring bank was an actual potential entrant in the relevant market. The Supreme Court affirmed the lower court's dismissal of the Government's complaint because the Government had failed to offer a persuasive case on the two preconditions for application of the actual potential entrant theory:

> Two essential preconditions must exist before it is possible to resolve whether the Government's theory, if proved, establishes a violation of § 7. It must be determined: (i) that in fact NBC has available feasible means for entering the Spokane market other than by acquiring WTB; and (ii) that those means offer a substantial likelihood of ultimately producing deconcentration of that market or other significant procompetitive effects. [418 U.S. at 633]

The Supreme Court also noted that in applying the potential competition doctrine courts must take into account federal and state regulations governing the relevant industry:

> If regulatory restraints are not determinative, courts should consider the factors that are pertinent to any potential-competition case, including the economic feasibility and likelihood of *de novo* entry, the capabilities and expansion history of the acquiring firm, and the performance as well as the structural characteristics of the target market. [*Id.* at 642.]

It is submitted that the Commission's decision at issue in the instant case contains a flaw similar to that in the Government's case in *Marine Bancorporation*. Both failed to analyze adequately the relevant factors relating to barriers to entry and the probable effects of the acquisition.[7]

2. Barriers to acquisitions by foreign firms are relevant

The Commission did not attempt to analyze the BOC-Airco acquisition in the manner required by these cases. Specifically, it did not take into account the numerous factors that make a foreign firm's *de novo* entry or toehold acquisition of an American firm inherently more difficult than an American firm's *de novo* entry or toehold acquisition of another American firm. Complaint Counsel introduced little evidence on this point.

In the submission of the British Government, in circumstances similar to those presented in this case, Complaint Counsel should adduce evidence to discharge the burden of proving that BOC had "available feasible means" [8] of entering the American industrial gases market other than by acquiring Airco. Such evidence and a careful analysis

---

[7] It might be contended that the reasoning of *Marine Bancorporation* is limited to regulated industries such as banking. However, this contention finds no support in the language of the Court—a point that Mr. Justice White noted in his dissenting opinion. *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602, 654 n.5 (1974). The *Marine Bancorporation* analysis has recently been applied by a court to an unregulated industry. *United States* v. *The Black & Decker Mfg. Co.*, —— F. Supp. —— (D. Md. Aug. 20, 1976) (Civil No. 73-964-B)

[8] *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602, 633 (1974).

thereof is required by *Marine Bancorporation.* Moreover, the Commission itself recently observed that the condition of entry into the market has been clearly recognized in the decided cases under Section 7 as a highly important structural variable. *Beatrice Foods Co.,* 81 F.T.C. 481, 528 (1972).

All firms, whether domestic or foreign, face a series of obstacles to entering a new market. However, a foreign firm seeking to enter a market in another country faces numerous additional commercial, cultural, and legal barriers which do not confront firms expanding inside a single nation. While at first glance, because of common language, the United States might appear to be a market posing few problems for a British company seeking entry, closer examination shows that there are a number of important obstacles for British, as well as other foreign firms, to overcome. Differences in the size of the market, in commercial practices, and in the legal framework alone are significant.

A recent Report to Congress by the U.S. Department of Commerce noted some of the additional barriers that confront foreign entrants:

> Foreign direct investments may entail problems and difficulties that domestic investments do not: the need to become acquainted with the laws, practices, and conditions of other countries; the danger of making serious mistakes through unfamiliarity; the difficulties of controlling operations at a distance and across national boundaries; the need to convert funds into other currencies at uncertain exchange rates; the possibility that the workers or the public abroad will be opposed to the investment; and the danger that the host government will restrict or interfere in the operation of the enterprise. In view of these considerations, investors must be strongly motivated to undertake activities in foreign countries. [U.S. DEPARTMENT OF COMMERCE, REPORT TO THE CONGRESS: FOREIGN DIRECT INVESTMENT IN THE UNITED STATES, Vol. 1, at 97 (U.S. Department of Commerce, 1976)]

The Court's attention is respectfully directed to the Annex to this brief which describes some of the numerous commercial and other barriers which may confront a foreign firm seeking to enter the United States.

As the Annex indicates, these barriers include: problems concerning foreign management's lack of knowledge or familiarity with American methods or standards for marketing, accounting, borrowing, and collective bargaining; problems of consumer unfamiliarity with a foreign firm's reputation or product; and statutes and regulations governing immigration, taxes, foreign ownership or control of businesses in the United States, and securities.

Although, generally, these barriers are not individually insurmountable, their cumulative effect is to increase the difficulty of entry by a foreign firm. In some situations these barriers may make *de novo* entry or significant expansion of a small toehold acquisition impossible or impractical. In all events, the Commission must consider the effect of the barriers to foreign entry in particular cases. Failure to undertake such an analysis is, the British Government submits, reversible error.

As previously indicated, the British Government does not contend that the legal standards are, or should be, different for acquisitions by foreign companies. However, it is submitted that the factors relevant to a proper analysis of whether Section 7 of the Clayton Act has been violated vary as between acquisitions by domestic firms and those by foreign firms for the reasons mentioned above. This contention may be analogized to the legal analysis necessary in tort cases to determine whether the "reasonable man" standard of conduct has been met. The legal standard is the same in each case, *i.e.*, whether the actor's conduct was that of a reasonable man. However, the factors which must be considered in order to answer properly this legal question vary with the particular circumstances of each case. Factors such as age, knowledge, emergency,

and physical attributes, must be analyzed in those tort cases where they are relevant.[9]

Similarly, in cases involving alleged violations of Section 7 of the Clayton Act the Commission and the courts must analyze all relevant factors, not merely statistics on market shares, concentration ratios, or other "yardsticks." *United States* v. *General Dynamics Corp.*, 415 U.S. 486, 496-504 (1974). This is particularly important when there are significant barriers to entry. *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602, 632 (1974).

3. All relevant factors were not analyzed

The record of this case contains evidence concerning some of these barriers to *de novo* entry or to significant expansion of a small toehold. For example, there is evidence of BOC's concerns with:

(a) Lack of consumer recognition, and wariness of foreign products and companies. (A2504-06, A5118, A5345)

(b) BOC's lack of distribution and marketing experience in the United States. (A3955-56)

(c) The absence of any assured demand for its production. (A2419-20, A2504-06)

(d) The need for back-up supply and the inability to provide it from three thousand miles away. (A878, A2507-09, A2721-22)

(e) Securities registration requirements imposed by agencies in the United States. (A4357, A5365)

(f) Lack of significant experience in dealing with American labor unions. (A4357, A5990)

(g) The U.S. Interest Equalization Tax. (A4358)

---

[9] *See, e.g.*, W. PROSSER, THE LAW OF TORTS 149-80 (St. Paul: West Publishing Co., 1971).

(h) The need to establish and rely on local management thousands of miles from corporate headquarters. (A5998)

However, Complaint Counsel clearly failed to pursue these matters adequately and to meet their burden of proof that BOC would *probably* have entered the American market *de novo* or via a smaller acquisition despite these barriers. It is the submission of the British Government that the Commission failed to consider these barriers and therefore its decision is not based upon an analysis of all relevant factors. Consequently, it should be set aside.

B. The Acquisition Was a Permissible Toehold in the Context Presented

Even if it is assumed that BOC was an actual potential entrant into the American industrial gases market, the Commission's Opinion failed to analyze whether the acquisition of Airco was a permissible toehold acquisition.[10] The British Government is concerned that unless flexible toehold analyses are made in cases involving the acquisition of American firms by foreign firms, foreign entry into United States markets could be severely impeded.

As was emphasized previously in this Brief,[11] a foreign firm's entry into an American market is inherently more difficult than an American firm's entry into another American market. The higher barriers to foreign entry will in many cases inhibit, or even prevent, *de novo* entry or entry by means of a small toehold acquisition. Conse-

---

[10] There was a dispute in the briefs before the Commission as to whether BOC conceded that Airco was not a toehold. However, if such a stipulation was made, it was withdrawn after the decision in *Missouri Portland Cement Co.* v. *Cargill, Inc.*, 498 F.2d 851 (2d Cir.), *cert. denied*, 419 U.S. 883 (1974). (A2865) Moreover, the record indicates that the toehold issue was argued before the Commission. Answering Brief of Counsel Supporting the Complaint at 43; Appeal Brief of BOC Respondents at 51.

[11] *See* pages 18-21, *supra*.

quently, foreign firms will often refrain from entering American markets if they are not able to acquire firms of sufficient size to make such a venture seem reasonably secure and sufficiently profitable in light of the special risks and difficulties of transnational entry.

1. The Commission made no toehold analysis

In its recent decision in *Budd Co.*, the Commission held that an acquisition may lead to improved competition against dominant market leaders and may therefore be permissible under Section 7 of the Clayton Act, even though the acquiring company was an actual potential entrant. This holding was based upon the following reasoning:

> "[I]n a highly concentrated, sluggish market, the acquisition of a small industry member by a powerful, innovative firm which, by building upon the base of the smaller firm can pose a more effective competitive challenge to the industry giants [may promote competition]. Such procompetitive mergers are not only not forbidden by Section 7, they are positively encouraged." "[T]he threat of a toehold merger by a powerful firm may often serve as a much greater incentive to competitive performance in the affected market than the prospect of more costly and slower internal, *de novo* expansion."
>
> [*Budd Co.*, 3 CCH TRADE REG. REP. ¶ 20,998, at 20,856 (FTC 1975), quoting *Bendix Corp.*, 77 F.T.C. 731, 818-19 (1970), *vacated on other grounds*, 450 F.2d 534 (6th Cir. 1971)].

Despite this reasoning, the Commission's Opinion in the present case contains no analysis of whether the Airco acquisition was a permissible toehold in the circumstances presented. The only reference to the toehold theory in the Opinion comes in a brief discussion of the existence of other "small companies which could presumably be purchased [by BOC]." (A887) This discussion focuses on

whether these smaller firms might be considered toeholds, not on whether Airco represented a toehold for BOC.

The only other clue to the Commission's thoughts on whether Airco was a toehold is a notation in the Commission's Findings of Fact, Conclusions and Order that the conclusion of the Administrative Law Judge (ALJ) "is adopted." (A859, referring to Conclusion IH) The referenced conclusion of the ALJ does no more than note Airco's share of the market,[12] quote the definition of "toehold" acquisition from a district court opinion [13] and state that: "[u]nder the above definition . . . Airco clearly is not a toehold acquisition." (A832)

Given the complete lack of toehold analysis in the Commission's Opinion it is difficult to ascertain why the Commission decided that Airco was not a permissible toehold. There appear to be two possible explanations of the Commission's adoption of the ALJ's conclusion: Either the Commission agreed with the ALJ's application of the toehold analysis in *Phillips* to the circumstances of the present case or the Commission has adopted *sub silentio* a presumption that the acquisition of a firm with more than 10% of the market cannot be a permissible toehold. In either event the Commission erred.

---

[12] The Commission found that Airco's share of the industrial gases market was 15.73%. (A874) BOC contends in its Brief that the Commission miscalculated, and as a result overstated, Airco's market share. If the estimated total value of industrial gases production in 1972 is adjusted upward as BOC urges, Airco's share of the recalculated total is 11.6%. (*See* pages 99-106 of BOC's Brief.)

[13] *United States* v. *Phillips Petroleum Co.*, 367 F. Supp. 1226, 1258 (C.D. Cal. 1973), *aff'd without opinion*, 418 U.S. 906 (1974), *reh. denied*, 419 U.S. 886 (1974) defines a "toehold" acquisition as:

> [O]ne which is sufficient to assist the potential entrant over the entry barriers and into the market, but not so large that the entrant merely replaces the acquired company; the acquiring company must have a substantial need to build upon the acquisition. Such a foothold acquisition is fully consistent with the concept of unilateral entry, since both envision a significant market-penetration effort by the entering company quite apart from whatever assets or market position have been acquired.

(a) *Phillips* is easily distinguishable

The *Phillips* situation is distinguishable from the BOC-Airco situation on at least two grounds.

First, a significant factor in the *Phillips* case was that the court found that Phillips had not acquired Tidewater with a view toward strengthening Tidewater's competitive position in its market. 367 F. Supp. at 1258. In the present case, by contrast, the evidence clearly shows that BOC planned to invigorate Airco and make it more competitive against its larger rivals.[14] Thus, BOC's acquisition of Airco, unlike the acquisition at issue in *Phillips,* was likely to have pro-competitive effects.

Second, the same paragraph of the *Phillips* decision quoted by the ALJ contains the following language which was ignored by the ALJ and by the Commission:

> the foothold acquisition cannot be looked upon with favor unless it is not only a foothold from which to achieve a substantial market entry, but is also necessary to such market entry—that is, unless the potential entrant could not have achieved a substantial market entry on a unilateral basis, perhaps supplemented only by incidental acquisitions of a *de minimis* nature.
>
> [367 F. Supp. at 1258]

The court then held that the evidence clearly established the "feasibility and likelihood of unilateral entry" by Phillips if it had not acquired Tidewater. *Id.* As was pointed out previously in this Brief, the record upon which the Commission based its decision contained uncontroverted evidence that entry by BOC other than via the Airco acquisition was neither "feasible" nor "likely."[15] Thus the premise of the *Phillips* decision, *i.e.*, that either *de novo* entry or a smaller acquisition was feasible and likely, is not present in this case.

---

[14] *See* pages 28-30, *infra.*

[15] *See* pages 6-7, *supra.*

(b) There is no presumption concerning the acquisition of a firm whose market share is more than 10%

Taken together, two related statements in the Commission's Opinion suggest that the Commission has adopted *sub silentio* a presumption that the acquisition of a firm with more than 10% of the market cannot be a permissible toehold. The Commission states that:

> Regional producers had sales substantially below 10 percent of industry sales and one or more small firms presumably could have been acquired for purposes of subsequent expansion into a national or semi-national operation. [A887-88]

This statement is supplemented by the following footnote:

> We do not agree, however, with complaint counsel that Chemetron should be classified as a toehold firm, since its business was nearly nationwide and it had 10% of the national market. [A888 n.18]

Each of these statements is followed by a citation to the Commission's *Budd* decision.

However, an analysis of the *Budd* decision and earlier cases cited in *Budd* plainly reveals that such a *sub silentio* presumption is neither mandated nor contemplated by these decisions.

In *Budd* the Commission held:

> We believe it to be desirable to observe a general rule in potential competition cases that firms possessing no more than 10% in a target market (where, as here, the 4-firm concentration is approximately 60% or more) should ordinarily be presumed to be toehold or foothold firms.
>
> [3 CCH TRADE REG. REP. ¶ 20,998, at 20,857 (FTC 1975)]

This is clearly a presumption that acquisitions of firms with no more than 10% of a market will have a *pro-competi-*

tive effect. The presumption is not conclusive and "can be rebutted in particular cases." *Id.* (footnote omitted). This holding is silent, however, as to cases involving acquisitions of firms with more than 10% of the market.

None of the other decisions involving the toehold theory profess to adopt a rule or presumption that an acquisition of more than 10% of the market cannot constitute a permissible toehold.[16] Moreover, courts have indicated that the potential competition and toehold theories cannot be blindly applied with mathematical precision. Judge Mansfield has stated:

> Vigorous enforcement of antitrust laws to bar mergers that may substantially lessen competition is essential to the economic lifeblood of this nation. But Congress has not outlawed all mergers. Nor has it, despite recommendations of some distinguished experts in the field, prescribed arbitrary standards for illegality which would prohibit every merger falling within a precise definition, even those in which the market percentage of one of the parties may be *de minimis*. On the contrary, Congress has recognized that antitrust flexibility is essential, since not all mergers threaten harm to the public, some even have the effect of promoting competition, and the issues turn on an understanding of the complexities of any given market.
>
> [*Stanley Works* v. *FTC*, 469 F.2d 498, 521 (2d Cir. 1972) (dissenting opinion), *cert. denied*, 412 U.S. 928 (1973)]

It is submitted that the adoption of a presumption that acquisitions of more than 10% of the market cannot be permissible toeholds falls far short of the careful analysis and flexibility required by Section 7 of the Clayton Act. *See, e.g., United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602, 641-42 (1974); *Varney* v. *Coleman Co.*, 385 F. Supp. 1337, 1345 (D.N.H. 1974).

---

[16] "No definitive toehold size limitation has been established." *United States* v. *The Black & Decker Mfg. Co.*, —— F. Supp. —— (D. Md. Aug. 20, 1976) (Civil No. 73-964-B) (slip op. at 71).

Flexibility and detailed analysis are required in all Section 7 cases, but they are especially important in a case involving the acquisition of an American firm by a foreign firm. As this Brief has repeatedly emphasized, foreign firms wishing to enter an American market face much higher barriers to their entry than do American firms.[17] In the instant case, the Commission has apparently presumed that a firm whose market share is greater than 10% cannot constitute a toehold. Such a presumption has the effect of raising yet another barrier to foreign entry.

It is clear that because of the special difficulties of transnational entry, BOC would not have entered the American industrial gases market by acquiring a firm smaller than Airco.[18] Consequently, if the Commission's decision stands, its effect will be to prevent the only entry into the American market that BOC or companies in a similar position would be willing to make. The American market will thereby be deprived of the healthy influx of competition that this entry would have brought to the market.

2. The Acquisition was Pro-Competitive

It is submitted that the Commission should have examined the BOC-Airco acquisition with at least the same thoroughness with which it analyzed the Budd-Gindy acquisition. There is substantial evidence in the record indicating that BOC's acquisition of Airco was likely to have pro-competitive effects. For example, Dr. Andrew Kridl of the Stanford Research Institute testified that he expected the acquisition:

> to result at the very minimum, in the injection of aggressive marketing and development methods of British Oxygen into Airco which, thereby, will certainly increase competition.

---

[17] *See* pages 19-21, *supra.*

[18] *See* pages 12-14, *supra.*

> More specifically, I would certainly imagine that Airco might reenter, together with British Oxygen, the business of building plants and thereby creating more competition in that area as well, not only in industrial gases. (A2977)

Unlike the two largest firms in the industry, Airco did not have the ability to build its own air separation plants. (A2473, A2487, A2496, A2977) BOC's Chairman, Leslie Smith, testified that BOC's acquisition would give Airco this ability and would thereby enhance its competitive position vis-a-vis the larger firms:

> It is our view that to have an in-house facility of that kind, an ability to design plant, design a manufacturing plant, is an advantage when it comes to the marketplace, that the negotiations on the supply scheme, as between industrial gas company, the customer, and the plant's supplier, is made somewhat easier, somewhat simpler by having all three, so to speak, in hand, rather than they should all be at arm's length.
>
> And it is our belief that it does enable an industrial gas company to act more flexibly, to perhaps offer the steel maker or the chemicals maker, whoever it might be wants the supply, a better scheme, one more adaptable. (A2496)

Other evidence of the probable pro-competitive effect of the Airco acquisition involved Airco's poor recent profit performance, unaggressive management, and loss of ground to its competitors. (A2977, A5338, A5360, A5978) Dr. Kridl testified that BOC's acquisition of Airco would enhance competition because:

> If Airco is to grow, and I would imagine that British Oxygen did not buy in solely in mind as an investment, certainly they could have found a hell of a lot better ones. I am sure we'll agree on that.
>
> Their objective is to make the company grow. The only way they can have them grow is to have them become more aggressive, enhance the competition and become more competitive. (A2977)

It is clear from the record that Airco would have benefited from BOC's more aggressive management and plant-building capability. Moreover, Airco's gains would have come largely at the expense of the two dominant firms in the market. It seems likely that BOC, through Airco, would not have attempted to take business away from the smaller local and regional firms in the business, because these firms offer their customers special services that a large corporation cannot provide as effectively. Instead, it would seem likely BOC would have concentrated on making Airco more competitive with its larger rivals. (A2489-92, A3008) The result would have been precisely the outcome contemplated by the toehold theory—the erosion of existing dominance in a market.

This uncontroverted evidence of the probable pro-competitive effects of the acquisition was not considered by the Commission. It is submitted that the acquisition was a permissible toehold in the context presented.

III. THE EFFECT OF THE COMMISSION'S DECISION ON INTERNATIONAL INVESTMENT

As was stated at the beginning of this Brief, the British Government is concerned that the Commission's decision in this case will, if not set aside, have detrimental consequences for international investment policies.

The United States and the United Kingdom are the world's two largest overseas investors, although the United States is by far the largest.[19] American companies are the largest foreign investors in the United Kingdom and the largest share of overseas investment by British companies goes to the United States.[20] This two-way flow of invest-

[19] In 1975, United States direct investment abroad totaled $133.1 billion. Bureau of Econ. Analysis, Dep't. of Commerce, 56 SURVEY OF CURRENT BUS., No. 8, at 49 (Aug. 1976).

[20] In 1975, foreign direct investment in the United States totaled $26.7 billion and United Kingdom direct investment in the United States totaled $6.6 billion. Bureau of Econ. Analysis, Dep't. of Commerce, 56 SURVEY OF CURRENT BUS., No. 8, at 37 (Aug. 1976).

ment offers substantial benefits to both countries. The home country of the investment may develop new markets, increase exports, obtain raw materials, and secure economic benefits from the repatriation of profits earned abroad. The host country may increase productive capacity and employment, obtain new technology, plant building capability, and management techniques, and improve domestic competition through the introduction of improved products, methods of production, sales and distribution.

The United States has consistently encouraged foreign investors to invest in American industry. According to the most recent *International Economic Report of the President:*

> U.S. policy on foreign investment is based on the premise that the operation of market forces will determine most efficiently the direction and magnitude of worldwide investment flows. The United States believes that an open system for international investment, without artificial incentives or impediments to investment flows here and abroad, will lead to the most efficient use of capital in the world economy.[21]

Similarly, the British Government's longstanding policy has been to encourage inward and outward foreign investment:

> Inward investment has made a substantial contribution to our economy notably in terms of increased productive capacity and employment, and the government continues to welcome foreign investment which contributes to our future development. Investment overseas by U.K. companies brings us a substantial return and enables us to develop markets overseas for U.K. exports and to secure supplies of raw materials.[22]

---

[21] INTERNATIONAL ECONOMIC REPORT OF THE PRESIDENT 62 (U.S. G.P.O., March 1976).

[22] INTERNATIONAL INVESTMENT, GUIDELINES FOR MULTINATIONAL ENTERPRISES (Foreword by Secretary of State for Industry), Cmnd. 5625 (June 1976).

The decision of the Commission at issue in this case may well erect a new barrier to foreign investment in the United States. The Commission's treatment of the "actual potential entrant" and "toehold" theories places primary reliance on what is essentially a subjective prediction as to whether and how a foreign firm may enter the United States. Years of careful analysis and experience by the foreign firm are ignored. Existing members of the industry are permitted to exclude a new competitor by offering speculative testimony against it. Finally, and perhaps most importantly, a critical dimension of this acquisition, *i.e.*, that it was a market entry by a foreign firm, is barely considered. It is crucial for the continuation of policies encouraging international investment that host governments take into account that entries by foreign firms are much more difficult than are domestic entries. The substantial additional barriers to foreign entry, both tangible and intangible, should be acknowledged and analyzed by the antitrust enforcement authorities in each case.

On June 21, 1976 representatives of the U.S. and British Governments, together with representatives of other members of the Organization for Economic Co-Operation and Development (OECD) signed a Declaration on "International Investment and Multinational Enterprises." That Declaration begins by noting the following "Considerations" of OECD member nations:

> that international investment has assumed increased importance in the world economy and has considerably contributed to the development of their countries;
>
> that multinational enterprises play an important role in this investment process;
>
> that co-operation by Member countries can improve the foreign investment climate, encourage the positive contribution which multinational enterprises can make to economic and social progress, and minimize and re-

> solve difficulties which may arise from their various operations.[23]

Both the United States and British Governments fully endorsed the Declaration by the OECD ministers which recognized the importance of international investment among OECD countries and included measures aimed at maintaining confidence in the climate for such investment.[24]

CONCLUSION

It is respectfully submitted that the "actual potential entrant" theory should not be accepted by this Court in this case involving the numerous transnational factors discussed above and the incomplete analysis of the relevant factors contained in the Commission's Opinion.

---

[23] The Declaration and related documents are reprinted in 15 INT'L L. MATS. 967 (1976).

Dr. Kissinger recently stated:

> Governments, too, have impeded the flow of capital through inconsistent policies or discriminatory treatment of international firms. And most industrial countries have been under pressure at home to take increasingly nationalistic positions toward international investment.
>
> If this trend is not halted, we shall face a gradual deterioration in the international investment climate, with serious consequences for economic development and the global economy.
>
> [*The Cohesion of the Industrial Democracies: The Precondition of Global Progress* (Statement by Secretary Kissinger before the Council of the OECD), 75 STATE DEPT. BULL. 73, 76 (July 19, 1976)]

[24] *See* 75 STATE DEPT. BULL. 73, 83-88 (July 19, 1976).

With the increase of international trade and investment, the competition policies of one country can and often do affect the economic interests of other countries significantly. Therefore the British Government urges that, in this case, the U.S. antitrust laws be applied in such a way as to give full and proper consideration to the special factors inherent in foreign investment and to the often stated need for harmony in international economic relationships. The decision of the Commission should be set aside.

Respectfully submitted,

EARL W. KINTNER
MARK R. JOELSON
JOSEPH P. GRIFFIN

ARENT, FOX, KINTNER, PLOTKIN & KAHN
1815 H Street, N.W.
Washington, D.C. 20006
202/857-6040

Attorneys for the Government of the United Kingdom of Great Britain and Northern Ireland

DATED: September 30, 1976

ANNEX

ANNEX

A Selected List of Commercial, Cultural, and Statutory Barriers to Entry by Foreign Firms Into the United States.

I. *Commercial Barriers to Entry*

A. *Foreign Management's Difficulty in Doing Business in a Foreign Land*

Courts have always recognized that foreign management may have difficulties in managing an American business because the foreign management will be unfamiliar with American customs and ways. *See Ronson Corp.* v. *Liquifin Aktiengesellschaft,* 483 F.2d 846, 849 (3d Cir. 1973), *cert. denied,* 419 U.S. 870 (1974); 370 F. Supp. 597, 608 (D.N.J. 1974). To many foreign corporations and their management, the sheer size and complexity of the United States as an economy and as a country is a significant deterrent to entry into the United States market. S. WEBLEY, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES: OPPORTUNITIES AND IMPEDIMENTS 36 (London: British-North American Comm., 1974).

B. *Marketing*

The American market requires certain marketing techniques which foreign management will have to learn and adjust to. What worked in other countries may not work in the United States. *See generally,* THE CONFERENCE BOARD, FOREIGN INVESTMENT IN THE UNITED STATES: POLICY, PROBLEMS AND OBSTACLES 28 (New York: The Conference Board, 1974).

C. *Labor*

Foreign management will be unfamiliar with American labor, its unions, and the statutes which regulate labor relations, *e.g.,* Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78 (1970); Equal Employment Opportunity Act, 42 U.S.C. §§ 2000e *et seq.* (1970), *as amend-*

ed, (Supp. V, 1975); and the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-19 (1970), *as amended,* (Supp. V, 1975). This will make it more difficult for the foreign management to control and deal with its American labor force. THE INSTITUTE FOR INTERNATIONAL AND FOREIGN TRADE LAW—GEORGETOWN UNIVERSITY LAW CENTER, LEGAL ENVIRONMENT FOR FOREIGN DIRECT INVESTMENT IN THE UNITED STATES 5-8 (Washington, D.C.: Georgetown University Law Center, 1972); Damm, *The Economic Aspects of European Direct Investment in the United States,* in THE MULTINATIONAL CORPORATION IN THE WORLD ECONOMY 41 (S. Rolfe and W. Damm eds., New York: Praeger Publishers, 1970); *Wary About Importing Foreign Work Rules,* BUS. WEEK, Sept. 29, 1973, at 66.

D. *Accounting*

Foreign accounting and auditing principles and techniques vary considerably from American principles, *e.g.,* depreciation and amortizing expenses. United States accounting is based on "generally accepted accounting principles", whereas many foreign countries base their accounting on statutory standards. This difference in accounting principles will present problems when the foreign management tries to evaluate the performance of the American subsidiary whose books will be based on American accounting principles. For those foreign parent companies which are required under their home country laws to prepare consolidated financial statements including their U.S. operations, the differences among country practices will necessitate the recasting of the U.S. operation's books according to the home country standards. This can be costly and time consuming. Furthermore, whenever the foreign parent corporation must file an accounting statement in the United States, *e.g.,* under SEC requirements, its books and audits will have to be redone according to American accounting standards. Comment, *Foreign Acquisitions in the United States: A Challenge to*

the Potential Competition Doctrine, 44 FORDHAM L. REV. 301, 317 (1975); Young, *The Acquisition of United States Businesses by Foreign Investors,* 30 BUS. LAW. 111, 118 (1974); U.S. DEPARTMENT OF COMMERCE, REPORT TO THE CONGRESS: FOREIGN DIRECT INVESTMENT IN THE UNITED STATES, Vol. 1, at 129-30 and Vol. 9, at P-10, P-11 (U.S. Department of Commerce, 1976).

E. *Finance*

Guidelines For Banks and Nonbank Financial Institutions, 51 FED. RESERVE BULL. 371-76 (1965), *repealed,* 60 FED. RESERVE BULL. 167 (1974).

A foreign corporation may wish to borrow money from a United States bank, *e.g.,* to obtain the necessary funds for a cash tender offer. However, from 1965 until January, 1974, the Federal Reserve Board under a voluntary program issued guidelines for banks to restrict loans to non-residents of the United States to 5% above the amount of outstanding credit to non-residents of the United States at the end of 1964. Furthermore, foreign corporations will not have established substantial relationships with American banks nor will the foreigners be accustomed to the amount of financial data that American banks require to be disclosed. Consequently, foreigners may find it difficult to obtain adequate financing from American banks. *See generally,* Elmer & Johnson, *Legal Obstacles to Foreign Acquisitions of U.S. Corporations,* 30 BUS. LAW. 681, 686 (1975); U.S. DEPARTMENT OF COMMERCE, REPORT TO THE CONGRESS: FOREIGN DIRECT INVESTMENT IN THE UNITED STATES, Vol. 1, 117-19 (U.S. Department of Commerce, 1976); R. HELLMANN, THE CHALLENGE TO U.S. DOMINANCE OF THE INTERNATIONAL CORPORATION 184-85 (Cambridge: Dunellen, 1970).

II. *Cultural Barriers to Entry*

A. *Reputation of the Foreign Corporation*

Most Americans will not know a foreign corporation's reputation. Therefore, a foreign corporation, unlike its American counterpart, cannot trade on its reputation. Comment, *Foreign Acquisitions in the United States: A Challenge to the Potential Competition Doctrine,* 44 FORDHAM L. REV. 301, 324-25 (1975). Furthermore, many customers, because of nationalistic spirit, may prefer to buy from Americans rather than foreigners.

B. *Personnel*

In order to manage an American subsidiary, some foreign personnel from the parent company may need to live in the United States. However, because of cultural differences, many foreign corporations have had difficulties in enticing their personnel to move to the United States. *See generally,* THE CONFERENCE BOARD, FOREIGN INVESTMENT IN THE UNITED STATES: POLICY, PROBLEMS AND OBSTACLES 28 (New York: The Conference Board, 1974).

III. *Statutory Barriers to Entry*

A. *Immigration Restrictions on Foreign Personnel*

8 U.S.C. § 1182(a)(14)(1970); 8 U.S.C. §§ 1101(a)(15)(B), (E), (H), (L) (1970); and 8 C.F.R. §§ 214.2(b), (e), (h), (l) (1974).

Immigration restrictions may impose barriers upon the management and day-to-day supervision of an American subsidiary by the foreign personnel of the foreign parent corporation. In order to gain admission to the United States as a permanent resident (or in some cases as a temporary worker), certain foreign engineers, technicians, skilled workers, and other personnel may be required to obtain certification from the Secretary of Labor that there are not sufficient workers in the United States who are

able, willing, qualified, and available to perform the work which the alien is destined to perform, and, furthermore, that the employment of such alien will not adversely affect the wages and working conditions of workers similarly employed in the United States. In addition thereto, or in lieu thereof, an alien seeking to enter the United States for business and/or work purposes may be subject to limitations, including, but not limited to: maintaining a foreign residence while in the United States; limiting the period of stay in the United States; having specialized skills or knowledge; and having previous experience with the companies involved. *See generally,* R. HELLMANN, THE CHALLENGE TO U.S. DOMINANCE OF THE INTERNATIONAL CORPORATION 174-75 (Cambridge: Dunellen, 1970); THE CONFERENCE BOARD, FOREIGN INVESTMENT IN THE UNITED STATES: POLICY, PROBLEMS AND OBSTACLES 27-28 (New York: The Conference Board, 1974); DEPARTMENT OF THE TREASURY, SUMMARY OF FEDERAL LAWS BEARING ON FOREIGN INVESTMENT IN THE UNITED STATES 15-16 (U.S. Department of the Treasury, June 1975); S. WEBLEY, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES: OPPORTUNITIES AND IMPEDIMENTS 36 (London: British-North American Comm., 1974); Elmer & Johnson, *Legal Obstacles to Foreign Acquisitions of U.S. Corporations,* 30 BUS. LAW. 681, 686-87 (1975).

B. *Taxation*

1. *Interest Equalization Tax*

INT. REV. CODE of 1954, §§ 4911-31, reduced tax to zero, Exec. Order No. 11766, 39 Fed. Reg. 3807 (1974).

The Interest Equalization Tax taxed stock and long-term debt obligations issued by foreign entities to United States persons. Although the tax was reduced to zero in January, 1974 and formally terminated as of June 30, 1974, it was in existence at the time of the BOC-Airco acquisition. The practical effect of the tax was to increase

the cost of U.S. capital to foreign corporations. Elmer & Johnson, *Legal Obstacles to Foreign Acquisitions of U.S. Corporations*, 30 Bus. Law. 681, 685-86 (1975); Note, *Foreign Investment-Capital Controls. Termination of the Interest Equalization Tax, the Foreign Direct Investment Regulations, and the Voluntary Foreign Direct Restraint Guidelines*, 6 Law & Pol. Int'l Bus. 1263 (1974); Damm, *The Economic Aspects of European Direct Investment in the United States*, in The Multinational Corporation in the World Economy 40 (S. Rolfe and W. Damm eds., New York: Praeger Publishers, 1970).

2. *Prohibition Against Filing a Consolidated Return*

Int. Rev. Code of 1954, §§ 1501-64 (specifically § 1504 (b)(3)).

Because the barriers to entry are so high in many United States markets, a new entrant may well encounter initial losses. An American corporation could file a consolidated return with its subsidiaries (if 80% owned) and use the initial losses of the new subsidiary to off-set the profits of the parent corporation and other subsidiaries, and thus recoup part of the losses by reducing current tax liabilities. A foreign corporation will not be able to write off these U.S. losses against the profits of its foreign operation because (1) a consolidated United States tax return cannot include any foreign corporation (with exceptions not relevant here) and (2) because some foreign countries will not allow United States losses of an American subsidiary to be used to offset home country profits of the home country parent. Therefore, the United States losses will not reduce current tax liabilities; nor will they ever produce tax advantages, unless the United States subsidiary earns enough income during the next 5 years so that the losses can be utilized as carryovers. Int. Rev. Code of 1954, § 172(b).

3. *Restrictions on Tax-Free Reorganizations*

INT. REV. CODE of 1954, § 367(a) & (b)

A foreign corporation can form a new United States subsidiary without adverse tax consequences, just as a United States corporation can. But a corporate reorganization may subsequently prove desirable. In the case of a foreign corporation, most types of reorganizations will be tax-free only if the Internal Revenue Service issues a private ruling to that effect. The necessity of obtaining such an advance ruling results in delay and expense. In the case of a United States corporation, there is no such requirement, though a ruling may be applied for as a matter of prudence. Young, *The Acquisition of United States Businesses by Foreign Investors,* 30 BUS. LAW 111, 126 (1974).

C. *U.S. Control of Foreign Owned Property*

Trading with the Enemy Act, 50 U.S.C. App. § 5(b)(1) (1970).

Under the Trading with the Enemy Act, the President, in time of war or national emergency (there need not be formal hostilities, *e.g.,* an adverse balance of payments might be deemed to be sufficient) can control any property in the United States in which a foreign national (even if he is not the enemy) has any interest. This is a continuous threat that every foreign corporation must face, and indeed since 1950 the United States has been in a "national emergency" as proclaimed under Proclamation No. 2914, 15 Fed. Reg. 9029 (1950). Congress recently enacted Pub. L. No. 94-412 (Sept. 14, 1976) which terminates in two years some of the "national emergency" statutes; however, the Trading With the Enemy Act is exempted. *See generally,* Craig, *Application of the Trading With the Enemy Act to Foreign Corporations Owned by Americans: Reflections on Fruehauf* v. *Massardy,* 83 HARV. L. REV. 579 (1970).

D. *Defense Department Restrictions*

32 C.F.R. §§ 155-59 (1975); and DEPARTMENT OF DEFENSE, INDUSTRIAL SECURITY MANUAL FOR SAFEGUARDING CLASSIFIED INFORMATION 63-64, 82 (1974) (U.S. Government Printing Office, DoD 5220.22-M)

Although there are limited exceptions for citizens of Canada and the United Kingdom, generally foreign nationals cannot gain access to classified information. Nor can security clearance generally be obtained for facilities "under foreign ownership, control or influence." THE CONFERENCE BOARD, FOREIGN INVESTMENT IN THE UNITED STATES: POLICY, PROBLEMS AND OBSTACLES 15 (New York: The Conference Board, 1974); DEPARTMENT OF THE TREASURY, SUMMARY OF FEDERAL LAWS BEARING ON FOREIGN INVESTMENT IN THE UNITED STATES 6-7 (U.S. Department of the Treasury, June 1975).

E. *Securities Regulation*

1. *Registration Requirement for Offering of Securities*

Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1970), *as amended,* (Supp. V, 1975).

An acquiring corporation which offers stock or other securities to public stockholders in the United States in an acquisition or merger must register the security under the Securities Act of 1933 (as well as state securities laws) unless there is an applicable exemption. The financial statements must be certified by an independent accountant and in general must conform with American "generally accepted accounting principles." *See* Young, *The Acquisition of United States Businesses by Foreign Investors,* 30 BUS. LAW. 111, 118 (1974); L. RAPPAPORT, SEC ACCOUNTING PRACTICE AND PROCEDURE 31.1-31.47 (New York: Ronald Press Co., 1972).

The registration statement will present problems to a foreign corporation because it will be unfamiliar with the

applicable requirements, it will not be accustomed to the amount and types of information that the SEC requires to be disclosed, and it will need its books audited and prepared according to American accounting principles. (*See* Annex I.D., *supra*) The Assistant Secretary of the Department of the Treasury, in DEPARTMENT OF THE TREASURY, SUMMARY OF FEDERAL LAWS BEARING ON FOREIGN INVESTMENT IN THE UNITED STATES 11-12 (U.S. Department of the Treasury, June 1975), stated the problems as follows:

> Our securities laws and practices are generally more rigorous than those in many foreign countries and foreigners in certain cases may consider our system burdensome.
>
> * * * *
>
> The U.S. securities laws often call for more disclosure than foreigners are accustomed to providing.

See also, S. WEBLEY, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES: OPPORTUNITIES AND IMPEDIMENTS 34 (London: British-North American Comm., 1974); U.S. DEPARTMENT OF COMMERCE, REPORT TO THE CONGRESS: FOREIGN DIRECT INVESTMENT IN THE UNITED STATES, Vol. 1, at 118, 130 (U.S. Department of Commerce, 1976); R. HELLMANN, THE CHALLENGE TO U.S. DOMINANCE OF THE INTERNATIONAL CORPORATION 184 (Cambridge: Dunellen, 1970).

2. *Reporting and Related Requirements*

Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78hh-1 (1970), *as amended,* (Supp. V, 1975).

If the foreign corporation issues stock or other equity securities in the United States, in addition to the registration statement the foreign corporation may have to furnish additional information to the Securities and Exchange Commission. If the securities are listed on a United States exchange or if the corporation has over 1 million dollars in assets and 500 or more shareholders, then it must comply

with the continuous reporting requirements of the Securities Exchange Act of 1934 if its business affects interstate or foreign commerce of the United States or its securities are traded in such commerce or by the use of the United States mails, unless there is an applicable exemption. Thus, the disclosure problem may be a continuous one. The SEC has relieved the problems somewhat by not requiring filings under the 1934 Act if less than 300 of the corporation's shareholders are American citizens and continuous reporting is not required as the result of another transaction. Furthermore, such filings can be replaced by the information the foreign corporation publicly discloses under its own country's laws, files under its own stock exchange rules for public examination, or distributes to its security holders, if (i) 50% or less of the voting securities of the corporation are held of record by residents of the United States or (ii) the business of the corporation is administered principally outside the United States and less than 50% of the members of the Board of Directors are residents of the United States.

Finally, the 1934 Act provisions on proxy solicitation and insider reporting and trading apply to the foreign corporations unless (i) or (ii) above is satisfied or the issuer is otherwise relieved from the provisions.

See generally, Young, *The Acquistion of United States Businesses by Foreign Investors,* 30 BUS. LAW. 111, 117-21 (1974); DEPARTMENT OF THE TREASURY, SUMMARY OF FEDERAL LAWS BEARING ON FOREIGN INVESTMENT IN THE UNITED STATES 11-13 (U.S. Department of the Treasury, June 1975); THE INSTITUTE FOR INTERNATIONAL AND FOREIGN TRADE LAW—GEORGETOWN UNIVERSITY LAW CENTER, LEGAL ENVIRONMENT FOR FOREIGN DIRECT INVESTMENT IN THE UNITED STATES 93-103 (Washington, D.C.: Georgetown University Law Center, 1972).

3. *Cash Tender Offers*

Section 14(d) of Securities Exchange Act of 1934, 15 U.S.C. 78n(d) (1970); *Ronson Corp.* v. *Liquifin Aktiengesellschaft,* 483 F.2d 846 (3d Cir. 1973), *cert. denied,* 419 U.S. 870 (1974); 370 F. Supp. 597 (D.N.J. 1974).

Though a cash tender offer avoids the registration requirements under the Securities Act of 1933, a public tender offer for more than 5% of the stock of a company required to file under the 1934 Act requires a filing with the SEC by the bidder. Under rules proposed by the SEC the bidder would be required to include its financial statements if they are material.

In a tender offer by a foreign corporation, more disclosure may be required for the foreign firm than for an American corporation. In *Ronson,* the United States Court of Appeals for the Third Circuit, in affirming a preliminary injunction against a tender offer, agreed with the district court that the source of funds is especially important "in light of the involvement of foreign entities unfamiliar with the problems of managing a large American corporation such as Ronson." 483 F.2d at 849.

The preliminary injunction was later vacated because the bidder made additional disclosures. However, the United States District Court noted that in making the tender offer, the bidder must disclose any foreign legal controls it must operate under. 370 F. Supp. at 608. The court was well aware of the predicament in which this placed the foreign acquiring firm: "Throughout these proceedings it has been obvious that the foreign defendants are subject to this nation's securities laws. If they chose not to furnish certain information, they could be faced with a choice between revealing such information or having the lawful restraints of this Court continued against them." 370 F. Supp. at 601 (footnote omitted). *See* Young, *The Acquisition of United States Businesses by Foreign Investors,* 30 BUS. LAW. 111, 119 (1974).

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BOC INTERNATIONAL LIMITED, f/k/a THE BRITISH OXYGEN COMPANY, LIMITED, BOC FINANCIAL CORPORATION, BOC HOLDINGS, LIMITED, AND BRITISH OXYGEN INVESTMENTS, LIMITED,	)	
Petitioners,	)	
v.	)	CIVIL ACTION NO. 76-4044
FEDERAL TRADE COMMISSION,	)	
Respondent.	)	

CERTIFICATE OF SERVICE

I, Joseph P. Griffin, Attorney for Amicus Curiae in the above-entitled action, hereby certify that on the 30th day of September, 1976, I served two copies of the attached Brief upon Jay Topkis, Esq., Paul, Weiss, Rifkind, Wharton & Garrison, 345 Park Avenue, New York, New York 10022, Attorney for Petitioners, and Jerold D. Cummins, Esq., Office of the General Counsel, Federal Trade Commission, Washington, D.C. 20580, Attorney for Respondent, by delivering two copies to each of them personally at the addresses listed above.

Joseph P. Griffin

JOSEPH P. GRIFFIN, ESQ.

Arent, Fox, Kintner, Plotkin & Kahn
1815 H Street, N.W.
Washington, D.C. 20006
(202) 857-6000

Attorneys for Amicus Curiae, the Government of the United Kingdom of Great Britain and Northern Ireland

14778-9-76